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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/092,878
Filing Date: March 06, 2002
Appellant(s): SCHRAMM, MICHAEL R.

MAILED
DEC 26 2007
GROUP 1700

Michael R. Schramm
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 10/13/2007 appealing from the Office action
mailed 12/06/2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

While the rejections of claims 22-27, 34-39, 41 and 49 under 35 USC 112, second paragraph were noted, they are not on appeal. Further while the rejections of claims 22-27 and 34-39, 41 and 48-50 under 35 USC 112, first paragraph for failing to teach in the originally filed specification a non-edible utensil, a device for dipping eggs having a handle portion and a egg retention portion, and a utensil having a handle portion and an open loop portion were noted, they are not on appeal. Thus these rejections are not contested.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,143,294	LINTVEDT	9-1992
3,840,678	PRICE	10-1974
5,758,797	MARTINDALE	6-1998
5,074,239	LAW	12-1991
3,464,599	METH	9-1969
5,246,046	SCHRAMM	9-1993
4,967,687	MCSHANE	11-1990
1,254,714	MCCOMBS	1-1918
1,428,356	GREAT BRITAIN (HUNTER)	3-1976
11-227388	JAPAN	8-1999
4,438,564	ASHTON	3-1984
4,921,713	FOWLER	5-1990

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 22-24, 34-39, 40-45 and 47-51 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The examiner maintains that the originally filed specification fails to teach or suggest that the container is comprised of a non-annular funnel connected to an opening in a wall of the container and wherein the funnel axis is defined as running substantially from the center of the opening in the wall to substantially the center of an opening in the funnel located within the container, and wherein a cross-sectional shape of the funnel in a position substantially normal to the funnel axis defines a cross-sectional shape having a first breadth dimension and a second breadth dimension and wherein the first breadth dimension is greater than the second breath dimension.

The term "non-annular" term is so broad that it reads on a variety of configurations other than one having an annular or circular cross-section and these configurations would include those that are not disclosed by the originally filed specification such as funnel having a square-shaped cross-section. Further, it is noted with respect to applicant argument's that his drawings clearly show that his funnel forms

the shape of extruded ellipse and therefore supports claim language that a first breadth dimension is greater than the second breadth dimension. The recitation that a first breadth dimension is greater than the second breadth dimension does not limit the shape of the funnel to an ellipse since the first breadth dimension and the second breadth dimension as claimed are not required to pass through the funnel axis and can in fact read on a figure with a circular cross-section since a cord which defines a given breadth dimension that does not pass through the funnel axis can have different lengths.

The originally filed specification fails to teach or suggest a non-edible utensil as set forth in claims 22, 34 and 48-49. For example, applicant has claimed the non-edible utensil is selected from a group set forth in claims 22,34 and 48 and includes a spoon and a straw and utensils such a spoon or spooning device and straw may be entirely edible as taught by Price 3,840,678 (see Figures 3-4) and Fowler at column 1 line 55.

If applicant disagrees then he needs to point out support in the specification and/or the drawings for a utensil which is non-edible.

The originally filed specification fails to teach or suggest a device for dipping eggs having a handle portion and an egg retention portion.

If applicant disagrees then he needs to point out support in the specification and/or the drawings for at least one utensil having a handle portion and an egg retention portion. Note Ashton 4,438,564 is cited for the sole purpose of showing a device for dipping eggs can have a handle portion and an egg retention portion yet have structure unlike that of a wire egg dipper which is argued by applicant as being constructed from formed wire and having an elongated handle portion and an open loop portion.

The originally filed specification fails to teach or suggest at least one utensil having a handle portion and an open loop portion.

If applicant disagrees then he needs to point out support in the specification and/or the drawings for at least one utensil having a handle portion and an open loop portion.

The originally filed specification fails to teach or suggest at least one utensil having a handle portion and non-handle portion.

If applicant disagrees then he needs to point out support in the specification and/or the drawings for a utensil having a handle portion and non-handle portion.

The originally filed specification fails to teach or suggest that the edible article and the non-edible utensil define two unconnected objects. Note the originally filed specification fails to teach the negative limitation that the edible article and utensil are "unconnected" objects. If applicant disagrees then he needs to point out support in the specification and/or the drawings.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 22-27,34-39,41 and 49 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The term "discreet" in claim 49 is confusing since it is unclear how it further limits the claimed objects since the term "discreet" as defined by the Random House Unabridged Dictionary is "modestly

unobstructive; unostentatious". The term "non -handle potion" set forth in claims 22, 34 and 41 is confusing since it is unclear what a "potion" encompasses.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
- (e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

- (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

It is noted in the amendment filed 2/14/2005 applicant has canceled in the instant application priority and therefore the benefit claimed under 35 USC 120 to the following US Patent Application Serial Numbers: US Patent Application Serial Number 09/021,617 filed February 10, 1998 now US Patent No 5,908,057, which was a continuation of co-pending US Patent Application Serial Number 08/608,854 filed February 29, 1996, now US Patent No 5,832,969, which was a continuation-in-part of co-pending US Patent Application Serial Number 08/086,541 filed July 1, 1993, now US Patent No. 5,495,876, which was a continuation-in-part of co-pending US Patent Application Serial Number

07/828,345 filed January 30, 1992 now US Patent No. 5,246,046 and reissued March 9, 1999. As a result of the cancellation of a benefit claim to the above cited applications, the earliest claim benefit filing for the instant application is the filing date for the parent application 09/287,798 which is 4/07/1999 (see MPEP 201.11).

Claims 21-22, 24-28, 30-34, 36-45 and 47-51 are rejected under 35 U.S.C. 103(a) as being unpatentable over under the combination of Law in view of Schramm 5,246,046, Great Britain 1,428,356 (Hunter), Martindale, Price 3,840,678 and Japan 11-227388.

Schramm '046 teaches a kit comprising a container designed to prevent spilling of flowable material contained therein, the container having an inner cavity and an opening in a wall of the container, the opening having a funnel connected to the opening to provide communication between the inner cavity and an exterior of the container, at least one utensil at least partially removably contained within the container, the utensil having a substantially elongated handle portion and an open loop portion, and liquid matter removably contained within the container.

Hunter teaches a kit comprising the combination of a container designed to prevent spilling of flowable material with a flowable material therein, wherein the flowable material can comprise a liquid, paint, or a granular material. Hunter teaches the container having an inner cavity and an opening in a wall of the container, the opening having a funnel connected to the opening to provide communication between the inner

cavity and an exterior of the container. Hunter teaches a discrete amount or upper fixed amount of liquid is contained in the container in order to prevent spillage therefrom.

Japan '388 teaches a kit comprising the combination of a container and a colorant, coloring liquid, contained within the container and a utensil, brush 8, being colored with the colored liquid wherein the container having an inner cavity, and exterior, an opening in a wall of the container and a funnel connected to the opening to provide communication between the inner cavity and the exterior of the container. Note Japan '388 also teaches the invention may include the combination of a drinkable liquid and a straw.

Martindale teaches the design of a kit comprising the combination of a container and flowable material, a granular or powdered dye/colorant, contained within the container wherein said container includes an inner cavity, an exterior, an opening in a wall of the container and a funnel connected to the opening to provide communication between said inner cavity and the exterior of said container. Martindale teaches a discrete amount or upper fixed amount of powder is contained in the container in order to prevent spillage therefrom.

Price teaches a kit comprising a container having an inner cavity and an opening in a wall of the container, the opening having a funnel connected to the opening to provide communication between the inner cavity and exterior of the container and an edible article, bread stick 26, and a non-edible utensil or spoon 32 removably contained within the container. Price teaches every element of the kit set forth in claim 49. With respect to claims 34 and 39, the Price non-edible utensil or spoon as shown in Figure 7

is at least partially removable from the container. Further, Price teaches the container resists spillage of discrete amount or fixed amount of the non-gaseous fluid contents or the edible matter or fluid food within the container when the container is oriented in any orientation.

Law teaches egg dyeing using a kit egg dyeing kit which uses the combination of a colorable non-utensil workpiece, an egg, at least one non-edible utensil (egg ladle and a brush), a colorant and a container. Law also teaches the mess associated with the egg dyeing process which occurs as a result of the spillage of the flowable materials contained within the container.

As evidenced by Schramm, Hunter, Japan '388, Price and Martindale, it is known to provide containers with a funnel that are connected to the opening of the container so as to provide communication between the inner cavity and the exterior of the container in order to prevent spillage of flowable non-gaseous material (solids or liquids). Therefore, it would have been obvious to one of ordinary skill in the art to substitute the container in an egg dyeing kit such as disclosed by Law with another container having a funnel that are connected to the opening of the container so as to provide communication between the inner cavity and the exterior of the container such as taught from the combined teaching of Schramm, Hunter, Japan '388, Price and Martindale since the combined teaching of Schramm, Hunter, Japan '388, Price and Martindale as discussed above teaches that such container prevent spillage of flowable non-gaseous material therefrom and especially in view of the disclosure of Law of the problems of associated with the spillage of the flowable material from the container of the egg

dyeing process. Thus, claims 21-22, 28, 27, 33, 34, 39, 40, 45 and 49 are obvious over the above cited combination of references. Further, absent the new matter, claims 47-48 are obvious over the above cited combination. In any event, if applicant points out support for the non-annular opening, it would have been an obvious matter of design choice to provide the opening of the container in the Law egg dyeing kit as modified with a shape with the scope of the claims 47-48 dependent on end use requirement of the kit (see *In re Dailey*, 149 USPQ 47). With respect to claim 41, the Law egg dyeing kit modified as discussed above would have contained an wire egg dipper within the scope in order remove the egg dyed in its modified kit. With respect to claims 50-51, Law shows the utensils in the kit include an egg ladle or wire egg dipper. Law teaches an egg ladle or wire egg dipper includes a substantially elongated handle portion and open loop portion. Law teaches the kit in use contains a egg which reads on a non-liquid edible matter. With respect to claim 25, 31, 37 and 43, Schramm, Japan '388 and Martindale each teach constructing the container from a plastic material. The method of forming the container from plastic in the form of a sheet is not germane to issue of the patentability of the device/container itself. Therefore, this limitation has not been given patentable weight. With respect to claims 24, 30, 36 and 42, Schramm, Japan '388 and Martindale each show in their Figures that the container is comprised of a first and second member. Schramm, Japan '388 and Martindale each show the container having a first member which is detachably engagable to the second member which is obviously at least partially sealingly engageable with the second member in order to prevent leakage of the contents from the container. With respect to claims 26, 32, 38 and 44,

absent how the flow channel relates to other structural elements of the container especially, the funnel of the container, the wall of the container below the funnel and including the funnel of the Schramm, Hunter, Japan '388 and Martindale container can serve as a flow channel.

Claims 23, 29 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over under Law in view of Schramm 5,246,046, Great Britain 1,428,356 (Hunter), Price 3,840,678, Martindale and Japan 11-227388 in further in view of Lintvedt.

Law, Schramm, Hunter, Price, Japan '388 and Martindale are applied for the reasons noted above but fails to teach the container is a transparent container. However, it would have been obvious to modify the Martindale container to construct it from a material that is transparent but obvious to do so for the advantages taught by Lintvedt of using a transparent container - enables the user to discern characteristics of the contents within the transparent container such as color.

In response to applicant's argument that providing the funnel with a non-annular shape is counterintuitive the following rejection is set forth below:

Claims 47-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over under the combination of Law in view of Schramm 5,246,046, Great Britain 1,428,356 (Hunter), Price 3,840,678, Martindale and Japan 11-227388 and if necessary, McShane 4,967,687.

Law, Schramm, Hunter, Price, Japan '388 and Martindale are applied for the reasons noted above but each fail to teach the funnel is non-annular. However, as discussed above, it would have been an obvious matter of design choice to provide the

opening of the container in the Law egg dyeing kit as modified with a shape with the scope of the claims 47-48 dependent on end use requirement of the kit (see *In re Dailey*, 149 USPQ 47) and, if necessary, McShane teaches as shown in Figure 1 providing the through opening of a device for dyeing eggs with a non-annular opening which reads on shape as set forth in claim 48 for the obvious advantage of facilitating the insertion of the egg into the container.

Claims 34, 36, 38-39 and 47-49 are rejected under 35 U.S.C. 102(b) as being anticipated by Price 3,840,678.

Price teaches a kit comprising a container having an inner cavity and an opening in a wall of the container, the opening having a funnel connected to the opening to provide communication between the inner cavity and exterior of the container and an edible article or edible commodity/object, discrete or distinct amount of fluid therein, and a non-edible utensil or spoon 32 removably contained within the container wherein the article and non-edible utensil are unconnected as shown in Figure 2 such that the recited utensil can manipulate the article. Price teaches every element of the kit set forth in claim 49. With respect to claims 47-48, Price teaches a kit comprising the following combination of elements: a container; edible matter 20; and a non-edible utensil 32. As discussed above, the Price container having an inner cavity and an opening in a wall of the container, the opening having a funnel connected to the opening to provide communication between the inner cavity and exterior of the container. Thus, absent the new matter, Price teaches every element of the claimed kit.

With respect to claims 34 and 39, the Price non-edible utensil or spoon as shown in Figure 7 is at least partially removable from the container. Further, Price teaches the container resists spillage of non-gaseous fluid contents of the container when the container is oriented in any orientation. With respect to claim 38, absent how the flow channel relates to other structural elements of the container, the cylindrical wall of the Price base 12 can serve as a flow channel. With respect to claim 36, Price shows the container as shown in Figure 2 comprised of a first member and second member wherein the first member is sealingly and detachable from the second member.

Claim 35 is rejected under 35 U.S.C. 103(a) as being unpatentable over under Price 3,840,678 in view of Lintvedt.

Price is applied for the reasons noted above but fails to teach the container is a transparent container. However, it would have been obvious to modify the Martindale container to construct it from a material that is transparent but obvious to do so for the advantages taught by Lintvedt of using a transparent container - enables the user to discern characteristics of the contents within the transparent container.

Claim 35 is rejected under 35 U.S.C. 103(a) as being unpatentable over under Price 3,840,678 in view of Schramm 5,246,046.

Price is applied for the reasons noted above but fails to teach the container is a formed plastic sheet. However, it would have been obvious to use as the material of construction of the Price container a formed plastic sheet since Schramm teaches the use of plastic as a material for construction of a container which contains edible matter. The method of forming the container from plastic in the form of a sheet is not germane

to issue of the patentability of the device/container itself. Therefore, this limitation has not been given patentable weight.

Claims 40-42 and 44-45 are rejected under 35 U.S.C. 102(b) as being anticipated by McCombs 1,254,714.

McCombs teaches a kit comprising a container and a paint which reads on a colorant as defined by The American Heritage Dictionary of English Language, Second Ed. 1982, "something, especially dye, pigment, ink or paint, that modifies the color of something else", the paint being a discrete article or commodity of colorant arranged in the container such that the level/height of paint therein is such that it reaches only at the bottom end of the neck of the funnel. McCombs teaches the container has an inner cavity and an opening in a wall of the container and a funnel connected to the opening to provide communication between the inner cavity and the exterior of the container. McCombs teaches every element of the kit set forth in claims 40-41. With respect to claim 45, McCombs container resists the spillage of non-gaseous fluid contents of said container when said container is oriented in any orientation (page 1 lines 101-110). With respect to claim 44, absent how the flow channel relates to other structural elements of the container, the cylindrical wall of the McComb base/body 1 can serve as a flow channel. With respect to claim 42, McComb container is comprised a first member and a second member and wherein the first member is sealingly and detachably engageable to the second member as shown in Figure 4.

Claim 43 is rejected under 35 U.S.C. 103(a) as being unpatentable over under McCombs 1,254,714 in view of Schramm 5,246,046.

McCombs is applied for the reasons noted above but fails to teach the container is a formed plastic sheet. However, it would have been obvious to use as the material of construction of the McCombs container a formed plastic sheet since Schramm teaches the use of plastic as a material for construction of a container which contains edible matter. The method of forming the container from plastic in the form of a sheet is not germane to issue of the patentability of the device/container itself. Therefore, this limitation has not been given patentable weight.

Claims 40 and 43-45 are rejected under 35 U.S.C. 102(e) as being anticipated by Martindale.

Martindale teaches the design of a kit comprising the combination of a container and colorant contained within the container wherein said container includes an inner cavity, an exterior, an opening in a wall of the container and a funnel connected to the opening to provide communication between said inner cavity and the exterior of said container, and wherein the colorant defines a discrete/distinct article or commodity, a predetermined quantity of colorant powder arranged in the container. Martindale teaches every element of the claimed kit as set forth in claim 40. With respect to claim 45, Martindale teaches the container resists the spillage of non-gaseous fluid contents of the container when the container is oriented in any orientation. With respect to claim 43, Martindale teaches the container is made from a plastic material. The method of forming the container from plastic in the form of a sheet is not germane to issue of the patentability of the device itself. Therefore, this limitation has not been given patentable weight. With respect to claim 44, absent how the flow channel relates to other structural

elements of the container, the cylindrical wall of the Martindale side wall form a flow channel.

Claim 42 is rejected under 35 U.S.C. 103(a) as being unpatentable over under Martindale.

Martindale is applied for the reasons noted above. Martindale shows in his Figures that the container is comprised of a first and second member. Martindale first member is detachably engagable to the second member and further is obviously at least partially sealingly engageable with the second member in order to prevent leakage of the contents from the container.

Claim 41 is rejected under 35 U.S.C. 103(a) as being unpatentable over under Martindale in view of Lintvedt.

Martindale is applied for the reasons noted above. Martindale fails to teach the container is a transparent container. However, it would have been obvious to modify the Martindale container to construct it from a material that is transparent but obvious to do so for the advantages taught by Lintvedt of using a transparent container - enables the user to discern characteristics of the contents within the transparent container such as color.

Claims 52-54 are rejected under 35 U.S.C. 103(a) as being unpatentable over Price 3,840,678 in view of Meth 3,464,599.

Price is applied for the reasons noted above. Price as discussed above teaches a kit or apparatus comprised of a spill proof or non-spill container having an inner cavity, a utensil 32, and at least one colorable work piece (bread stick) as depicted in Figure 7,

the container having an opening in a wall of the container and a funnel connected to said opening to provide communication between the inner cavity and an exterior of the container, and wherein the opening is adapted to permit a work piece to pass through the opening, and wherein the at least one colorable work piece is removably contained within the container, and wherein the utensil is removably positioned within the opening of said container for accessing contents of the container through the opening. Price fails to teach the container is comprised of a well formed in the inner cavity and such well being adapted to receive the work piece.

Meth teaches a container comprised an inner cavity, an exterior, an opening in a wall of the container to provide communication between the inner cavity and the exterior of the container and a funnel connected to the opening, wherein the container resists the spillage of liquid contents of the container when the container is oriented in any orientation, wherein the opening is adapted to permit an article to pass through the opening, and wherein the inner cavity includes a well formed in the cavity, the well being adapted to receive a portion of the at least one article as shown in Figure 13. Meth fails to teach the container removably contains an edible article.

However, it would have been obvious to modify the Price apparatus by substituting its non-spill liquid container with another non-spill liquid container such as taught by Meth for the obvious reason to expect similar end results that is providing a quick food service item in a non-spill liquid container. Thus claims 52-54 are obvious over the above cited references.

(10) Response to Argument

Appellant's argument that Figure 3 clearly supports that the edible article and utensil are unconnected objects such that the utensil is operable to manipulate the edible article is found to be non-persuasive. First of all, it is pointed out that when the utensil touches the edible article to manipulate the edible article the utensil is temporarily associated with which reads on connected with the edible article. Second of all as noted above, the Price edible article or edible commodity/object, discrete or distinct amount of fluid therein as shown in Figure 2 is unconnected prior to insertion of the non-edible utensil or spoon 32 in the container such that the recited utensil can manipulate the article.

Appellant's argument that brush utensil as shown in Figure 3 provides support for the claim language that utensil includes a handle portion and non-handle portion is found to be non-persuasive. A utensil including a handle portion and non-handle portion encompasses a variety of tools not disclosed by appellant in the originally filed specification.

Appellant's argument that Law fails to teach a egg container with a funnel is found to be non-persuasive. Law is applied to teach an egg dyeing kit which uses the combination of a colorable non-utensil work piece (an egg), at least one non-edible utensil (egg ladle and a brush), a colorant and a container. Law recognizes the problem associated with the process of egg dyeing is the mess which occurs as a result of the spillage of the flowable materials contained within the container. As evidenced by Schramm, Hunter, Japan '388, Price and Martindale, it is known to provide containers with a funnel that are connected to the opening of the container so as to provide

communication between the inner cavity and the exterior of the container in order to prevent spillage of flowable non-gaseous material (solids or liquids). Therefore, it would have been obvious to one of ordinary skill in the art to substitute the container in an egg dyeing kit such as disclosed by Law with another container having a funnel that are connected to the opening of the container so as to provide communication between the inner cavity and the exterior of the container such as taught from the combined teaching of Schramm, Hunter, Japan '388, Price and Martindale since the combined teaching of Schramm, Hunter, Japan '388, Price and Martindale as discussed above teaches that such container prevent spillage of flowable non-gaseous material therefrom and especially in view of the disclosure of Law of the problems of associated with the spillage of the flowable material from the container of the egg dyeing process.

Appellant's argument that it is counterintuitive to provide the funnel member with a shape and size that will allow the passage of the egg there though is found to be non-persuasive. First of all, the majority of the claims are not limited to the passage of an egg through the opening of the of the funnel rather are directed under the broadest interpretation as being limited to the passage of an edible work piece or edible article through the opening of the funnel and the edible article can have an infinite number of configurations other than that of an egg. In any event. it would have been an obvious matter of design choice to provide the opening of the container in the Law egg dyeing kit as modified with a shape with the scope of the claims 47-48 dependent on end use requirement of the kit (see *In re Dailey*,149 USPQ 47) and, if necessary, McShane teaches as shown in Figure 1 providing the through opening of a device for dyeing eggs

with a non-annular opening which reads on shape as set forth in claim 48 for the obvious advantage of facilitating the insertion of the egg into the container.

Appellant's argument that Price fails to teach a non-fluid edible matter and at least one utensil is found to be non-persuasive since Price clearly shows in his Figures that his kit includes at least one utensil (spoon 32) and non-fluid edible matter (the bread stick 26) and both the spoon and breadstick are removably contained within the container 10.

Appellant's argument that McCombs fails to teach that his kit includes a discrete article of colorant is found to be non-persuasive. As discussed above, McCombs teaches a kit comprising a container and a paint which reads on a colorant as defined by The American Heritage Dictionary of English Language, Second Ed. 1982, "something, especially dye, pigment, ink or paint, that modifies the color of something else", the paint being a discrete article or commodity of colorant arranged in the container such that the level/height of paint therein is such that it reaches only at the bottom end of the neck of the funnel. McCombs teaches the container has an inner cavity and an opening in a wall of the container and a funnel connected to the opening to provide communication between the inner cavity and the exterior of the container.

Appellant's argument that Martindale fails to teach that his kit includes a discrete article of colorant that is a single discrete article of colorant is found to be non-persuasive. Applicant has claimed the kit includes at least one colorant from the group which includes a discrete article of colorant and therefore the claim is open to a plurality of discrete articles of colorant with the term "comprising" in the claim.

Appellant's argument that his invention defines over the combination of Price and Meth in that the utensil and colorable work piece define discrete unconnected objects is found to be non-persuasive since it is not commensurate in scope with claim limitations.

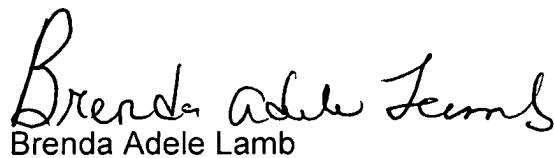
Appellant's argument that the prior art fails to teach the container includes at least one channel is found to be non-persuasive. WordNet defines a channel as "a passage for water (or other fluids) to flow through" and, therefore, the wall of the container below the funnel and including the funnel of the Schramm, Hunter, Japan '388 and Martindale, Price and McCombs container can serve as a flow channel.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Brenda Adele Lamb

Primary Examiner

Conferees:



Nadine Norton

Application/Control Number:
10/092,878
Art Unit: 1792

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for
Jennifer Kolb-Michener
Appeal Specialist